

The Background Check

The Equal Employment Opportunity Commission carefully scrutinizes the use of background check by employers. While such screening can be an important tool in hiring, those considering it should consult legal counsel to ensure legal, nondiscriminatory application.

What follows is a brief explanation of some of the common pitfalls of background checks, as well as some basic tools and guidance for proper and legal use of background checks. This document is not, nor is it intended to be, legal advice. Nor does this document provide an exhaustive list of all potentials for liability. It is for informational purposes only.

What is the potential liability?

Negligent hiring

A claim by a third party against an employer that the employer knew or should have known that an employee's background indicated a propensity for violence or untrustworthiness.

Example: Employee was recently hired by Company to serve as a delivery truck driver. Unknown to Company, Employee has been the cause of multiple accidents, received several speeding and reckless driving tickets, and on some occasions has been pulled over for driving under the influence. When Employee causes an accident, Third Party brings suit against Company for negligent hiring.

Specific Case Examples: 1. Deerings West Nursing Center v. Scott - Company was found liable for \$235,000 for the negligent hiring of an unlicensed nurse. She had 56 previous criminal convictions. The nurse assaulted an 80-year-old visitor. 2. McLean v. Kirby Co. A vacuum cleaner manufacturer was found liable for \$45,000. A distributor hired a door-to-door salesperson with a criminal record who raped a female customer in her home. The manufacturer should have required its distributors to conduct pre-hiring screening of door-to-door salespersons.

Vicarious liability

An employer can be liable for the acts or omissions of its employees, provided it can be shown that they took place in the course of their employment.

Example: Employee was recently hired by Company to serve as a delivery truck driver. While en route to a delivery, Employee causes an accident. Third Party brings suit against Company.

Specific Case Example: Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton made clear that employers are subject to vicarious liability for unlawful harassment by supervisors.

Discrimination – disparate treatment

Not applying policies and procedures consistently. Sometimes this is called discriminatory application. In general with disparate treatment it can be shown that the intent was to discriminate.

Example: When considering applicants for employment, Company only conducts background checks for employees who are members of a particular protected class.

Specific Case Examples: 1. On June 17, 2013 EEOC sued Performance Food Group, Inc. for an ongoing pattern of refusing to hire women for operative positions. High level managers made statements like “Why would we ever waste our time bringing in females?”. Vice Presidents said women would slow down the operation and that it would be a good idea to get the females “out of here.” 2. On May 20, 2013 EEOC sued Stone Pony Pizza for refusing to hire African-American applicants. Stone Pony is alleged to have hired only whites for front-of-the-house positions such as server, hostess, waitress, and bartender, and hired African-Americans for back-of-the-house positions such as cook and dishwasher.

Discrimination – disparate impact

Discrimination based on the application of policies. Disparate impact happens when practices seem unbiased but have the consequence of discriminating.

An employer can limit liability only if able to demonstrate that adverse selection practices had “a manifest relationship to the employment in question” or that they were justified by “business necessity.”

Example: A common example is requiring a high school diploma. Statistically more minorities do not complete high school. If there is not a “business necessity” for graduating to perform the job, then this requirement could create disparate impact.

Specific Case Examples: Costa v. Markey A height requirement for police officers was a part of the screening. The requirement excluded more women than men.

Invasion of Privacy

Information sought should be relevant to the job and necessary to the hiring decision. Seeking information later in the hiring process and only on directly pertinent information can minimize the risk.

Example: Privacy rights come up in situations involving drug testing, blogs, arrest records, credit reports and other off-duty conduct.

What is a background check?

Federal and State law require specific types of background checks for certain occupations. Examples include law enforcement and child care workers.

A variety of hiring practices can be considered a background check for employers. The **EEOC** recommends creating a **detailed written plan** for each job. The guidance further says an “individualized assessment” is to be made if a candidate does not pass your company’s background criteria. An individualized assessment means asking the person about the factors of the information in the background. If an applicant is denied the position, the reason should be “job related and consistent with business necessity.”

Below are the most common types of background checks utilized.

Criminal Records

Checks can include federal, state and county records search. 3rd party companies sometimes use a Social Security Trace to determine all locations candidate has lived for a set amount of time. They then obtain criminal records from those locations.

The **Green** factors should be used in evaluating criminal history:

1. the nature or gravity of the offense;
2. the time elapsed since the conviction and/or completion of the sentence; and
3. the nature of the job sought or held.

In Montana, employers may not ask about arrests, only convictions. (*Mont. Admin. R. 24.9.1406*)

Driving records

Records should only be obtained for individuals whose job requires them to drive on company time.

In Montana driving records can be obtained for a fee from the **Motor Vehicle Division**. If the driving history is for a specific number of years, ask for addresses in that time, or use the social security trace if conducted. Each state a candidate has lived in should be checked.

Your insurance company should have guidance on the criteria. Keep in mind that cost savings on insurance may not be considered a business necessity for excluding certain applicants.

Credit check

Generally credit checks are conducted on positions which involve money handling, whether cash or electronically. Some view running a credit check as an invasion of privacy. Having a **written plan** of which positions the company reviews credit for and the business need can help defend your practice.

If conducting credit checks, the **Fair Credit Reporting Act** must be followed. This includes getting permission and allowing candidates to respond to any information that negatively affects employability.

Reference check or Verification of past employment

Reference checks are to find information on a candidate's employment history. Some employers will only confirm dates of employment and position. Because applications sometimes are inaccurate, even finding this information can be helpful.

A **form** with the answers received can be attached to the candidate's application. Generally employers conduct reference checks on only those interviewed or only those they would like to hire. Be consistent about which stage you call previous employers.

Common questions are to verify dates of employment, position held and if the person is re-hirable.

Verification of education

Generally employers will request a transcript copy if a position has a degree required. Review each position to determine if education is related to ability to perform the job.

Military service

Potentially used if military service is part of work history. Verifying service can be important if wage is dependent on years of experience in an occupation.

Name, rank, salary, duty assignments, awards and duty status can be obtained from the DD214.

Character reference

Similar to a reference check, except this can be asked from anyone and includes many potential characteristics that are not easily measured. For instance, asking references if they think the candidate is honest or a hard worker.

In general this type of reference check does not yield good applicant screening information. In addition, it adds to the time needed for checking candidates. There are several reasons why these checks are not as reliable as other methods. References listed by applicants will usually be inclined to speak positively about the person. The information asked for is subjective. The information shared by one reference may be different than what is found about another candidate, so a true comparison cannot be made.

How to conduct a background check

An early decision on using background checks as part of your screening process is determining whether the company will conduct checks on its own or use a third party.

3rd party	In house
Range of cost options	Minimal cost
Better liability coverage	Less liability coverage
Usually 2 simple forms	Time to track and conduct

3rd party background checks

3rd party background check providers cover a range of costs and options. The [National Association of Professional Background Screeners](#) is a good starting point when researching companies. If you are comparing rates, it is helpful to know which background checks you likely will request and an idea of the frequency.

The company you select should provide a release of information, a copy of the [FCRA Summary of Rights](#) to give applicants, and an Adverse Action sample. The Fair Credit Reporting Act summary must be provided to anyone you have a 3rd party company obtain a background for, not just Credit reports.

In-house background checks

Have a **written record** of what reference and background checks will be used for all positions. Be consistent in what is reviewed. Any decisions should be based on business necessity.

Some resources available for conducting background checks are:

Montana CONWEB app.mt.gov/conweb/

View records for convicted felons. Only records for felonies obtained and convicted in the state of Montana are displayed. Federal offenses, convictions in other states, and misdemeanors are not included. This website is maintained by the Montana Department of Corrections.

Montana Sexual and Violent Offender Registry doj.mt.gov/svor

Provides a list of sexual and violent offenders who are required to register. The information may not reflect the most recent residence, status or other information regarding an offender.

National Sex Offender Public Registry nsopw.gov

Searches the public sex offender registries from all 50 states, the District of Columbia, the five principal U.S. territories, and federally recognized Indian tribes. Does not include any additional charges. Those who are no longer required to register are not listed.

Driving Records doj.mt.gov/driving/drivingrecords.asp

Full record of Montana driving record. Available online for \$7.25 each or through mail option.

Background Checks doj.mt.gov/enforcement/criminaljustice/backgroundchecks.asp

For a fee, employers can receive a copy of felony charges and misdemeanor charges. Information may be limited by Montana's privacy laws. The cost is \$11.50 per request.

Additional help

Your local Job Service has business service specialists who can assist with your entire recruitment and selection process. A list of offices is [here](#).

Resources

[Enforcement guidance](#)
[Q & A for employers](#)

Written background plan

Some questions to consider in determining which background checks to use are:

Does this position have regular customer contact? Is it in a public area? in a home?

Does this position handle money? Do you have a good check and balance process?

Do you work with children? Another vulnerable population?

Will driving for the company be part of the job?

Sample

Position:

Checks to be conducted:

☐ State felony background

What is the business reason this check should be conducted for this position?

When will check be done?

All applications

All interviewed

Selected candidate pre-offer

Selected candidate post-offer (conditional upon meeting criteria)

How will background be retrieved?

By hiring manager using ConWeb

By hiring manager through DOJ

By background check provider -

How many years back will be considered?

What will require review and an individualized assessment?

Type of crime (i.e. theft, violent, driving, etc.):

For each type of crime, how long is the look back period:

Sample reference check form

Applicant: _____

Position applied for: _____

Employer: _____

Contact Person: _____ Contact Phone: _____

Position listed on application: _____

Start/End date on application: _____

Wage on application: _____

What was the person's job title?

What were the job duties?

What are the dates of employment?

We are considering hiring (applicant) as a (position), would that cause you any concern?

Would this person be eligible for re-hire?

Is there anything I haven't asked that you would like to share with me?

Reference checked by: _____